

CLERK OF COURT
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

04 11580 PBS

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

MAGISTRATE JUDGE *Dein*

Plaintiff,

v.

DAVID SANTOS,

Defendant.

RECEIPT #
CIVIL ACTION # *50*
SUMMONS ISSUED *98*
FILE NO. *NO*
LOCAL RULE 4.1
WAIVER FORM
MCF ISSUED
BY DPTY. CLK. *FW*
DATE *7/14/04*

COMPLAINT

Elaine L. Chao, Secretary of the United States Department of Labor, hereby alleges:

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and is brought pursuant to ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132 (a)(2) and (5) to redress violations and to enforce the provisions of Title I of ERISA.

2. The Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. Venue of this action lies in the District of Massachusetts pursuant to Section § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. J.D. Graphics, Inc. DBA Jonathan David Printing ("Graphics") was, during the period from January 1, 1002 to the present ("the pertinent period"), an employer within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5). Until October 2002, Graphics was a corporation with an office and place of business at 25 Salem Street, Medford, MA, within the jurisdiction of this Court. Graphics ceased operations in October 2002.

5. During the pertinent period, Defendant David Santos (“Santos”), has been the President, owner and sole shareholder of Graphics, and has been residing at 14 Thomas Road, Lynnfield, MA 01940.

6. On March 1, 1995, Graphics established the J.D. Graphics 401(k) Plan (the “Plan”), an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and which is covered under ERISA pursuant to § 4(a), 29 U.S.C. § 1003(a).

7. The purpose of the Plan is to provide retirement benefits for the exclusive benefit of its participants, employees of Graphics, and their beneficiaries.

8. During the pertinent period, Graphics has been the sponsor of the Plan, as defined by ERISA § 3(16)(B)(i), 29 U.S.C. § 1002(16)(B)(i). Graphics also acted as Plan Administrator for the Plan, and as such, was a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Furthermore, at all times relevant hereto, Graphics was a party in interest within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C)

9. During the pertinent period, Defendant Santos has been a Trustee of the Plan and a “named fiduciary” with respect to the Plan within the meaning of ERISA § 402(a), 29 U.S.C. § 1102(a).

10. During the pertinent period, Defendant Santos, as Trustee of the Plan, has further been a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and at all times exercised discretionary authority and control regarding the administration and management of the Plan. Furthermore, at all times relevant hereto, Defendant Santos has been a party in interest within the meaning of ERISA § 3(14)(A) and (H), 29 U.S.C. § 1002(14)(A) and (H).

11. According to Plan documents, the Plan was to be funded by withheld employee contributions determined by participant election in amounts ranging up to 15% of the participant's compensation per pay period. During the pertinent period, the contributions withheld on behalf of each Plan participant became assets of the Plan by operation of 29 C.F.R. § 2510.3-102.

12. During the pertinent period, Defendant Santos failed to forward withheld employee contributions in a timely manner. Defendant Santos failed to remit to the Plan employee contributions beginning in June 2002. Defendant Santos failed to remit subsequent withheld employee contributions to the Plan until Graphics ceased withholding employee contributions in October 2002. To date, withheld employee contributions, excluding Santos' contributions, total \$11,287.48, plus interest, and are due and owing to the Plan.

13. From June 2002 to the present, no measures were undertaken by Defendant Santos, as a named fiduciary, to collect employee contributions that Graphics failed to forward to the Plan.

14. As a result of the conduct set forth at paragraphs 12 and 13, Defendant Santos failed to discharge his fiduciary duties for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA §§ 403(c)(1) and 404(a)(1)(A), 29 U.S.C. §§ 1103(c)(1) and 1104(a)(1)(A).

15. As a result of the conduct set forth at paragraphs 12 and 13, Defendant Santos failed to discharge his fiduciary duties with care, skill, prudence and diligence, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

16. As a result of the conduct set forth at paragraphs 12 and 13, Defendant Santos participated in what he knew or should have known constituted a prohibited transaction by

dealing with the assets of the Plan in his own interest or for his own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

17. As a result of the conduct set forth at paragraphs 12 and 13, Defendant Santos participated in what he knew or should have known constituted a prohibited transaction by dealing with the assets of the Plan on behalf of a party whose interests were adverse to the interests of the Plan and its Participants and Beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

18. As a result of the conduct set forth at paragraph 12 and 13, Defendant Santos engaged in prohibited transactions by causing or permitting the transfer of assets of the Plan to, or use by or for the benefit of Graphics, a party in interest, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

- (a) Permanently enjoining Defendant Santos from violating, or knowingly participating in violations of, the provisions of ERISA §§ 403, 404 and 406, 29 U.S.C. §§ 1103, 1104 and 1106.
- (b) Permanently enjoining Defendant Santos from serving as a fiduciary to the Plan or any other employee benefit plan covered by ERISA;
- (c) Requiring Defendant Santos to undo the prohibited transactions in which he engaged and to restore to the Plan any and all losses incurred as a result of breaches of his fiduciary duties and the violations he committed or for which he is liable, with appropriate interest;
- (d) Awarding to Plaintiff the costs of this action, and other relief as is equitable and just.

Howard M. Radzely
Solicitor of Labor

Frank V. McDermott, Jr.
Regional Solicitor



Kelly M. Lawson
Attorney

U.S. Department of Labor
Attorneys for Plaintiff

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Boston, MA 02203
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DATE: July 8, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Elaine L. Chao, Secretary of Labor v. David Santos

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

☐ I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.

☒ II. 195, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950.

*Also complete AO 120 or AO 121 for patent, trademark or copyright cases

☐ III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.

☐ IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.

☐ V. 150, 152, 153.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES ☐ NO ☒

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES ☐ NO ☒

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES ☐ NO ☐

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES ☐ NO ☒

7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES ☒ NO ☐

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division ☒ Central Division ☐ Western Division ☐

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division ☐ Central Division ☐ Western Division ☐

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES ☐ NO ☒

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Attorney Kelly M. Lawson

ADDRESS JFK Federal Building - Room E-375, Boston, Massachusetts 02203

TELEPHONE NO. (617) 565-2500

JS 44 (Rev. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

U. S. Department of Labor,
Elaine L. Chao, Secretary of Labor

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

David Santos

County of Residence of First Listed: Essex
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Attorney Kelly Lawson
Office of Regional Solicitor, Dept. of Labor
JFK Federal Building - Room E-375
Boston, Massachusetts 02203

Attorneys (If Known)
Attorney Kenneth A. Cossingham
Cossingham Law Office, P.C.
800 Turnpike Street - Suite 305
North Andover, Massachusetts 01845

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ DEF Incorporated or Principal Place of Business in This State ☐ 4 ☐ DEF
- Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business in Another State ☐ 5 ☐ 5
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395M) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIW C/DIWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RS1 (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl. Ret. Inc. Security Act	

V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

Pursuant to ERISA, sec. 502(a)(2) and (5), 29 U.S.C. sec. 1132 (a)(2) and (5) to redress violations and enforce provisions of Title I of ERISA.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE
8 July 2004

SIGNATURE OF ATTORNEY OF RECORD

Attorney Kelly M. Lawson

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE